**YONG ENG KONG & ORS.**

**v.**

**YING TIEN PING**

HIGH COURT BORNEO, KUCHING
HAIDAR MOHD. NOOR J
[ORIGINATING SUMMONS NO. KG. 198 OF 1990]
11 SEPTEMBER 1990

***UNINCORPORATED ASSOCIATIONS:*** *Members in arrears of subscription payments - Whether automatically cease to be members - Revival of membership - Procedure - Acting within the rules and constitution of the association.*

In 1981, 31 members of the Foo Chow Association (the association) obtained an interim injunction against the then chairman and secretary general restraining them from holding an annual general meeting (AGM).

By consent order dated 19 June 1990, the interim injunction was discharged and an interim committee (IC) was appointed. As a result of default of 19 members being in arrears of their monthly subscriptions, the IC advertised in the Chinese press requesting members to settle their arrears so that they may be eligible to vote or hold office at the AGM scheduled for 17 September 1990. The current chairman of the IC and the defendant in these proceedings Y, issued notices under art. 13(7) of the rules and constitution of the association to each and every defaulting member for payment of arrears, failing which the IC could take action under art. 131(4). The plaintiffs then commenced proceedings seeking certain directions from the Court in respect of the consent order dated 19 June 1990 in relation to the powers of the IC *vis-a-vis* the interpretation of art. 13(3) and (4).

Article 13(3) and (4) refer to non-payment of subscriptions of members and the resulting consequence as to membership of the defaulting members; argument as to the meaning of 'shall' in art. 13(3).

**Held:**

**[1]** Under art. 13(2) the onus is on the members to pay their subscriptions, therefore the use of the word "shall" in art. 13(3) is directory and not mandatory and the failure to invoke art. 13(3) does not mean that art. 13(4) cannot be invoked; it is merely a reminder to the defaulting members to pay their subscriptions and no more.

**[2]** (a)The wordings in art. 13(4) seem clear and unambiguous, that is, a member who allows his arrears to exceed six months' subscription shall automatically cease to be a member of the association.

(b) Therefore, the question of revival of membership by paying up all the arrears does not arise; in any event there is no such express provision in the rules and constitution of the association giving the power to the executive committee or the IC to do what they are currently purporting to do.

(c) The only way for those members to return as members would be by payment of a re-entrance fee.

**[3]** The approval of the membership register as at 22 April 1981 only opposed the list of members who are not in arrears and who are not in default of any provisions of the rules of the association, including the deletion of members who have migrated or are dead.

**[4]** Only those members who are not in arrears in their subscriptions and who are not caught by art. 13(4) are entitled to attend and vote at the coming AGM and be elected in accordance with the rules and constitution of the association.

**[5]** The action of the IC in inviting the defaulting members to pay the arrears of the subscriptions is beyond the scope of the terms of reference under the consent order.

*[Order accordingly.]*

**Case referred to:**
*Re The Sick and Funeral Society of St. John's Sunday School, Golcar [1972] 2 All ER*

**Legislation referred to:**
Rules of the High Court 1980, O. 7 r. 2

**Other sources referred to:**
*The Shorter Oxford English Dictionary*, 3rd Edn.

*For the plaintiffs - K.J. Foo; M/s. Foo Kana & Co.*
*For the defendant - Lee Chuan Eng; M/s. Ee & Lim*

**JUDGMENT**

**Haidar Mohd Noor J:**

The plaintiffs, namely Yong Eng Kong, Ting Yang Tieh @ Ting Kong Ing and Lee Dung Chu, filed this originating summons on their own behalf and on behalf of 46 other members of the Foo Chow Association, Kuching ("association") against Ying Tien Ping as chairman of the Interim Committee of the association under O. 7 r. 2 of the Rules of the High Court 1980 seeking certain directions from the Court in respect of the consent order dated 19 June 1990 in Suit no. 189 of 1981 regarding the powers of the Interim Committee as per the said consent order.

The directions of the Court are primarily centred on the action of the Interim Committee advertising in the Chinese press (see Exhibit YEK 8B) purporting to call on all members who were in arrears of their monthly subscriptions to settle them with the secretary in order that they may be eligible to vote and/or be qualified to hold office in the association at the general meeting of the association scheduled to be held on 17 September 1990. In fact the secretary of the Interim Committee has since accepted payments of arrears of monthly subscriptions which in some cases dated back several years (Exhibits YEK 9A to J).

*Background Facts*

The association was founded sometime in 1931 and officially registered after the second world war on 12 February 1958. The objects of the association are spelt out under art. 3 (Exhibit YEK 3). Sometime in 1981, some thirty-one of the then existing members of the association instituted a Writ of Summons No. Kg. 189 of 1981 against the then chairman and secretary-general of the association. The plaintiffs in the said action obtained an interim injunction against the then defendants on 22 April 1981, restraining them from convening and/or holding an annual general meeting of members of the association on 26 April 1981 until after the trial of the said action or until further order.

Subsequent to the said interim injunction and in compliance thereof, the association did not hold the annual general meeting on 26 April 1981 and indeed for the next nine years or so as no attempt, I believe, was made to set aside the interim injunction. However, the association continues to function and in striving to attain the objects of the association as laid down in its rules and constitution, it yearly called on its members to pay up their monthly membership subscriptions in the Chinese press in order to carry out its activities (Exhibits YEK 4AA to EE).

By consent order dated 19 June 1990 (Exhibit YEK 5) the said interim injunction was discharged and an Interim Committee was appointed. The terms of reference of the Interim Committee are:

(1) That an Interim Committee comprising of the persons named therein be and is hereby appointed to manage the affairs of the association until the next general meeting.

(2) That the Interim Committee shall approve the membership as at 22 April 1981 and arrange for a general meeting of the association to, *inter alia*, elect office bearers for the years 1990 - 1991, to be held within three (3) months from the date of this order, such general meeting to be called and held in accordance with the rules of the association.

(3) That the Interim Committee shall be at liberty to apply for extension of time if necessary.

According to the affidavit of Yin Tien Ping, the chairman of the Interim Committee and the defendant in this originating summons (encl. 8) from the membership record available as at 22 April 1981, the association has 731 members. During the period from 27 April 1981 to 26 August 1990, 50 members have died. Further, 1 member has emigrated to China. This leaves a total of 680 members as at 26 August 1990. However, from the said record of the association only 183 members are up to-date in their subscriptions payments and a total of 497 members are in arrears. He therefore verily believed that those 497 defaulting members ought to be dealt with under art. 13(3) and (4) of the rules and constitution of the association and that art. 13 ought to be read as a whole. Hence the notice issued purportedly under art. 13(3) to each and every defaulting members to pay up the arrears as in the advertisement (Exhibit YEK 8B) before the Interim Committee believed they could take action under art. 13(4). The advertisement and the receipt of the payments of the arrears of the defaulting member by the Interim Committee so that they are entitled to vote and also be elected at the general meeting sparked off the filing of this originating summons by the plaintiffs.

art. 13(3) reads:

> Any member who allows his arrears to exceed two months subscription shall receive a written notification signed by or on behalf of the secretary-general, and shall be denied the privileges of membership until he settles his account.

art. 13(4) reads:

> Any member who allows his arrears to exceed six months' subscription shall automatically ceases to be a member of the association and the executive committee may direct that legal action be taken against him, provided that they are satisfied that he has received due notice of his debts.

The issue then is on the powers of the Interim Committee as embodied in the said consent order *vis-a-vis* the interpretation of art. 13(3) and (4) of the association. Whatever it may be, in my view, the Interim Committee must act within the provisions of the rules and constitution of the association and there should not be any dispute as to this.

Mr. Lee, Counsel for the defendant, argued that the word 'shall' in art. 13(3) denotes that it is mandatory for action to be taken under the said provision first before art. 13(4) can be invoked. Miss Foo, Counsel for the plaintiffs argued that it is not mandatory and went on to say that it is the duty of every member to pay his subscription promptly without the association having to issue notices to pay up the subscriptions or the arrears as seem clear from art. 13(2) which reads:

All monthly subscriptions shall be payable to the treasurer within the month thereof.

In my view considering that the onus is on the members to pay their subscriptions as seems to be the object of art. 13(2) it would appear therefore that the use of the word 'shall' in art. 13(3) is directory and not mandatory and the failure to invoke art. 13(3) does not mean that art. 13(4) cannot be invoked as seemed to be the submission of Mr. Lee, Counsel for the defendant. I would say that it is merely a reminder to the defaulting members of their obligation as members of the association to pay their subscriptions and no more.

I will next have to consider art. 13(4) and its effect. The wordings seem clear and unambiguous to me that a member who allows his arrears to exceed six months' subscription shall automatically cease to be a member of the association. As I said earlier it is the obligation of every member to pay his subscription if he wants to continue to be a member and to exercise his rights within the province of the constitution of the association. In this respect Megarry J in the *Re The Sick and Funeral Society of St. John's Sunday School, Golcar* [1972] 2 All ER at p. 447 said:

> I should be very slow to accept that a member of a society may disregard all his obligations as a member for several years, and then, when it appears that there is some advantage in resuming his membership, assert that he is still a member because the correct procedure under the rule to terminate his membership has not been followed. The question, of course, is not one of expulsion, or of the society snatching at some trivial or short-lived breach of rules by a member to deny him membership; it is a question of a voluntary disregard of the obligation of membership over a continuous period of years.

Further on at p. 448 thereof Megarry J gave his views on the effect of where a membership is said to have lapsed as follows:

> If their membership is said to have 'lapsed', that may be another way of describing a tacit resignation. However it is described, it seems right that there should be such a doctrine, so that neither the member nor the club or society should be able to claim against the other on the basis that what has long been dead *de facto* still lives *de jure*. A moribund membership ought not to be capable of resurrection.

Here art. 13(4) clearly provides for the membership to cease automatically when a subscription is in arrears of six months thereby indicating that such a member shall *ipso facto* cease to be a member of the association and to use the words of Megarry J there is a ''tacit resignation'' by such a member. Therefore in my view the question of revival of the membership by paying up all the arrears does not arise and in any event there is no such express provision in the rules and the constitution of the association giving the power to the executive committee or for that matter the Interim Committee to so exercise as would appear in this case for the main purpose of enabling the defaulting members to pay up their arrears so as to enable them to vote at the coming general meeting of the association when in fact and in law they ceased automatically to be members of the association and if I may say so, after having "abandoned the ship". However it does not mean that the door is shut out for them by the association as art. 13(5) gives the power to the executive committee to fix a re-entrance fee for such members who allowed their membership to cease through arrears of subscriptions. In my view this is the only way for them to come back as members of the association and not otherwise. To allow those defaulting members to revive their membership by paying up their arrears as was done in this case by the Interim Committee would, with due respect, be nugatory of art. 13(4).

In the circumstances the approval of the membership register as at 22 April 1981 by the Interim Committee must of necessity mean only one thing, that is, to approve only the list of members who are not in arrears and are not in default of any provisions of the rules and constitution of the association. Quite apart from this, the Interim Committee obviously will also have to delete from the list those members who are dead or who had migrated. The word 'approve' according to *The Shorter Oxford English Dictionary*, 3rd Edn. means 'to confirm authoritatively'. Therefore to confirm authoritatively the list of the membership must denote that it must be done within the framework of the authority under the constitution of the association.

As such I would direct that only those members who are not in arrears in their subscriptions and are not caught by art. 13(4) of the association are entitled to attend and vote at the coming general meeting of the association and be elected as well to the executive committee in accordance with the rules and constitution of the association. The action of the Interim Committee in inviting the defaulting members to pay the arrears of their subscriptions is beyond the scope of the terms of reference under the said consent order for the reasons set out by me.

In view of my decision, it is unnecessary for me to make an order for the extension of the holding of the annual general meeting scheduled for 17 September 1990 as in prayer E.

In respect of costs though Miss Foo pressed for costs but I believe that she was not really seriously pursuing for costs and in any event in view of the *bona fide* belief of the Interim Committee that they were acting within the scope of the terms of reference of the consent order *vis-a-vis* the constitution of the association the proper order as to costs should be that there be no order as to costs and I do so order.

Also found at [1991] 1 CLJ 186